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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNION ELECTRIC COMPANY, PETITIONER

v.

CITY OF KIRKWOOD, MISSOURI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a utility that charges wholesale and retail rates at levels that unfairly prevent its competitor-customers from competing with it ("price squeeze" conduct) is immune from the antitrust laws under the *Noerr-Pennington* doctrine solely because the rates were filed with state and federal regulatory agencies that did not order any changes creating or increasing the alleged anticompetitive effect.

2. Whether such an alleged "price squeeze" is immune from the federal antitrust laws by implication from the Federal Power Act, which creates no express antitrust exemption for wholesale electric rates subject to regulation by the Federal Energy Regulatory Commission and which confers no authority on FERC to regulate retail rates.

3. Whether such an alleged "price squeeze" is immune from the federal antitrust laws under the "state action" doctrine, where the conduct at issue is the result of essentially private decisions not compelled by the state, the state has articulated no policy in favor of the conduct at issue, and the state has no authority to regulate wholesale rates.

4. Whether electricity is a "commodity" within the meaning of the Robinson-Patman Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Union Electric Company (UE) is an electric utility that produces, transmits, and delivers electric power to wholesale and retail customers in Missouri, Iowa, and Illinois (Pet. App. A-3). Respondent (Kirkwood), a municipal corporation, sells electric power at retail to customers in approximately two-thirds of its geographic area (*ibid.*).

Kirkwood does not produce electricity, but buys it at wholesale from UE. Customers in the area of Kirkwood not served by the municipal distribution system buy power at retail from UE (*ibid.*).

UE's *wholesale* rates are regulated by the Federal Energy Regulatory Commission (FERC)[1] under the Federal Power Act, 16 U.S.C. (& Supp. V) 824 *et seq.* UE's *retail* rates are regulated by the Missouri Public Service Commission under Mo. Ann. Stat. ch. 393 (Vernon 1952 & Cum. Supp. 1982).

The Federal Power Act requires that all rates subject to FERC's jurisdiction be just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). Public utilities, such as UE, must file with FERC "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates." 16 U.S.C. 824d(c). Before making any modification of such rates, the utility must give 60 days notice to FERC and the public. 16 U.S.C. (Supp. V) 824d(d). On complaint or on its own initiative, FERC may order a hearing into the lawfulness of a filed rate change and may suspend the proposed change for up to seven months. 16 U.S.C. (Supp. V) 824d(d) and 16 U.S.C. 824d(e).[2] If FERC does not order a hearing on a proposed rate change, the new rate takes effect at the end of the 60-day notice period.

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[1] Prior to October 1, 1977, the Federal Power Commission (FPC) had essentially the same statutory authority insofar as is here relevant. References to FERC in this brief should be interpreted, where appropriate, as referring to the FPC.

[2] If a hearing is not completed before the expiration of the suspension period, the proposed rate schedule takes effect, but FERC may require the utility to refund with interest any portion of the increase subsequently found "not justified."

In addition, on its own motion or on complaint, FERC may order a hearing to determine whether any previously established rate or contract is "unjust, unreasonable, unduly discriminatory or preferential"; if it finds that it is, FERC may establish a just and reasonable rate or contract that the utility must observe. 16 U.S.C. 824e(a).

Missouri state law requires that utilities file their *retail* electric rates with the Missouri Public Service Commission (PSC). A retail rate cannot go into effect until the PSC approves it, but the PSC must act within 11 months after a rate proposal is filed. Mo. Ann. Stat. § 393.150 (Vernon Cum. Supp. 1982). The standard applied by the PSC in deciding whether to approve a rate is whether it is unjust, unreasonable, unjustly discriminatory, or unduly preferential. Mo. Ann. Stat. § 393.140(5) (Vernon Cum. (Supp. 1982).

2. On September 1, 1977, Kirkwood filed a complaint alleging that UE had violated the Sherman Act, 15 U.S.C. 1 *et seq.*, and the Robinson-Patman Act, 15 U.S.C. 13 *et seq.* It sought damages and injunctive relief. The complaint alleged that UE had monopolized and attempted to monopolize the retail distribution and sale of electric power by imposing an anticompetitive "price squeeze" [3] on Kirkwood

[3] A "price squeeze" may arise in a situation in which a firm competes with its supplier. In the present case, Kirkwood is a retailer that competes with its wholesale supplier, UE, for retail business. Thus, if UE raises its wholesale prices to Kirkwood, but maintains its retail prices at a level that would not allow Kirkwood to make a profit based on its increased wholesale costs, then Kirkwood is subjected to a "price squeeze." Whether a "price squeeze" is anticompetitive depends on a number of factors, including the relative efficiency of the competing firms and whether the price relation complained of is attributable to the supplier's conduct rather than forced on the supplier by a public authority.

by manipulating the relationship between its wholesale rate to Kirkwood and its retail rates. In 1975, UE was alleged to have increased its wholesale rate for electric power by more than 33% while taking no action to increase its retail rates. Pet. App. A-30. As a result, Kirkwood alleged, it "paid approximately 35 percent more than Union was selling comparable power at retail to its large industrial primary service customers." *Ibid.* This practice, Kirkwood alleged, was similar to previous UE rate practices. Although UE subsequently increased its retail rates and reduced its wholesale rates somewhat (as a result of settlement of FPC proceedings), it was Kirkwood's contention that the price squeeze continued. *Id.* at A-31.

According to Kirkwood, the price squeeze caused antitrust injury by precluding Kirkwood from competing with UE for retail sales.[4] The complaint also alleged that the disparity between UE's wholesale and retail rates had substantially lessened competition between UE and Kirkwood, thus violating the Robinson-Patman Act, 15 U.S.C. 13(a).

3. The district court granted summary judgment for UE. Pet. App. A-19 to A-24.[5] The court held that

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[4] Kirkwood alleged that it was precluded from "selling power to its customers at retail at the same rates charged by [UE] at retail without impairing the traditional benefits derived by [Kirkwood] from its municipally owned system" (Pet. App. A-30 to A-31), and that this "result[ed] in a loss of revenues and/or pressure on the citizens and officials of [Kirkwood] to discontinue operating the utility and to offer to sell or lease it to [UE]" (*ibid.*).

[5] The district court had previously dismissed the Robinson-Patman Act claim on the grounds that electricity is not a "commodity" within the meaning of the Act and that the

Kirkwood's exclusive remedy for the alleged price squeeze was with the state and federal regulatory agencies. UE's rates, the court also held, were exempt from antitrust challenge because they were subject to federal regulation under the Federal Power Act and state regulation by the Missouri PSC. Finally, the court held that UE's filing of tariffs with FERC and the state commissions, and its collection of rates pursuant to those tariffs were immune from antitrust liability under the First Amendment and the *Noerr-Pennington* doctrine.[6]

4. The court of appeals reversed. It held that FERC and PSC did not have exclusive jurisdiction over the price squeeze claim. Pet. App. A-6 to A-11. Rather, the court held, under this Court's decisions in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), and *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) (*Otter Tail*), the antitrust laws are applicable to regulated utilities and an award of antitrust damages would not infringe on FERC's regulatory jurisdiction. The court of appeals further held that the price squeeze claims were not immunized by the state action doctrine because there was no legislative policy favoring the conduct at issue and because the interrelation of the wholesale and retail rates was not controlled by regulatory authorities. Finally, the court held that there was no immunity under *Noerr-Pennington* because: "It is not for expression of

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complaint did not sufficiently allege sales in interstate commerce. Kirkwood moved for reconsideration of that order, but the district court granted summary judgment in favor of UE without specifically ruling on that motion.

[6] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (*Noerr*); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) (*Pennington*).

opinion that Kirkwood seeks to compel UE to respond in damages, but rather for UE's conduct in the market place." Pet. App. A-14 to A-15.[7]

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.[8] Review by this Court is therefore unwarranted.

1. Petitioner argues first that the alleged price squeeze[9] is immunized from antitrust scrutiny by the *Noerr-Pennington* doctrine. This argument was properly rejected by the court of appeals. The *Noerr-Pennington* doctrine reflects this Court's conclusion that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr*, *supra*, 365 U.S. at 135.

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[7] The court of appeals also held that electricity is a "commodity" for purposes of Kirkwood's Robinson-Patman Act claim.

[8] The court of appeals did not address the merits of respondent's antitrust claims. The fact that petitioner's conduct is not exempt from the antitrust laws does not, of course, establish an antitrust violation. See *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 n.5 (1979); *Union Labor Life Insurance Co.* v. *Pireno*, No. 81-389 (June 28, 1982), slip op. 5.

[9] A firm that has monopoly power is said to have engaged in a "price squeeze" and has violated Section 2 of the Sherman Act, 15 U.S.C. 2, if it discriminates against customers who are its competitors in another market (i.e., charges them higher prices not justified by differences in costs), if that discrimination unduly impedes competition, and if the monopolist's pricing is intended to have that effect. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In other words, Congress did not intend the antitrust laws to apply to attempts by private parties to obtain government action that would restrain competition—even where the result is subsequent government action that in fact imposes such a restraint.

Noerr-Pennington is inapplicable here, however, because Kirkwood did not base its complaint on the results of restrictive governmental action sought by UE or on UE's efforts to obtain such governmental action. Kirkwood does not challenge the legality of either the wholesale rate approved by FERC or the retail rate approved by the Missouri PSC. Rather, Kirkwood has alleged that it was injured by the relationship between those rates, decided upon and put into effect by a private party, UE, for the purpose of eliminating Kirkwood as a competitor. Since no regulatory body imposed, or had jurisdiction to impose, the combination of rates whose competitive effect is challenged, petitioner's *Noerr-Pennington* arguments were properly rejected by the court of appeals.[10]

Petitioner's argument that such private conduct is immunized merely because UE obtained governmental acquiescence or approval constitutes an unwarranted attempt to expand the *Noerr* doctrine, and is directly contrary to this Court's holding in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), that anticompetitive conduct pursuant to a tariff filed with a regulatory body is not immune from antitrust scrutiny.[11] See also *California* v. *FPC*, 369 U.S. 482, 488-

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[10] A similar *Noerr-Pennington* defense to a price squeeze claim was rejected by the Seventh Circuit in *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 981-983 (1980), cert. denied, 449 U.S. 1096 (1981).

[11] Petitioner contends (Pet. 7) that the court of appeals' reliance on *Cantor* was unjustified because the Court's refer-

489 (1962); *United States* v. *RCA*, 358 U.S. 334, 350-352 (1959). Indeed, in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), this Court held that private actions designed to influence rates that are subject to regulation are not immune from the antitrust laws because of subsequent regulatory adoption of the rates—a holding that has not been overruled by *Noerr* or any other decision.

2. Petitioner also contends (Pet. 9-12) that this Court's decision in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), requires a holding that the Federal Power Act creates an implied[12] antitrust exemption for the price squeeze at issue in this case.[13] The court of appeals correctly rejected this argument.

The strict standards that govern judicial determination of implied antitrust immunity based on subse-

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ence to *Noerr* appears in a portion of Justice Stevens' opinion not concurred in by a majority of the Court (428 U.S. at 601-602) and because the *Cantor* decision did not turn on *Noerr-Pennington*. We believe reliance on *Cantor* was appropriate. No member of the Court expressed the view that the conduct at issue in *Cantor* was immunized by *Noerr*. Moreover, if a majority in *Cantor* had concluded that *Noerr* conferred immunity, there would have been no need to remand the case.

[12] The Federal Power Act contains no express antitrust exemption applicable to the conduct at issue in this case. In contrast, the Interstate Commerce Act, for example, provides an express and limited antitrust exemption for collective ratemaking agreements approved by the ICC. 49 U.S.C. (Supp. IV) 10706(a)(2)(A).

[13] Petitioner concedes (Pet. 9) that federal and state regulation of electric utilities has been held by this Court not to create any general exemption or immunity from the federal antitrust laws. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976).

quent regulatory statutes have been articulated by this Court in a long line of cases and "are well established." *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross*, 452 U.S. 378, 388 (1981) (*National Gerimedical*). Exemptions from the antitrust laws are not favored; such exemptions " 'can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.' " *National Gerimedical*, *supra*, 452 U.S. at 388, quoting *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975); see also *Gordon* v. *New York Stock Exchange, Inc.*, *supra*, 422 U.S. at 682; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973). Even then, repeal of the antitrust laws is implied narrowly, only to the minimum extent necessary to make the regulatory scheme work —so as to effectuate the fundamental principles of the antitrust laws to the maximum extent consistent with the regulatory scheme. *National Gerimedical*, *supra*; *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-359 (1963).

It follows that no implied exemption should be found in this case because, contrary to petitioner's contention, there is no "clear repugnancy" between the Federal Power Act and the application of the Sherman Act to the conduct at issue. There is no indication in the language or legislative history of the Federal Power Act that it was intended to authorize a price squeeze. Nor is there any inherent inconsistency between the requirement of the Federal Power Act that rates be "just and reasonable" and the application of Section 2 of the Sherman Act to price

squeezes.[14] Thus, as in *Otter Tail*,[15] the conduct at issue here remains subject to the Sherman Act.

The situation is entirely different from that which led this Court to find implied immunity in *Gordon*. There, the implied exemption for the conduct at issue—the fixing of rates for brokerage commissions—was based on actual conflict between the antitrust laws and the applicable regulatory statute. The Court found that the securities laws were intended to authorize, subject to regulatory supervision, the fixing of brokerage commission rates, which otherwise would have constituted price fixing—a per se violation of the Sherman Act. It was Congress' authorization of the conduct at issue,[16] and not the mere

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[14] The possibility that conflict might arise in the future (if, for example, a price squeeze were proved and if the district court then ordered UE to remedy the price squeeze by lowering its wholesale rates to a level deemed unreasonably low by FERC) does not warrant a grant of immunity in the absence of any actual conflict. *Otter Tail, supra*, 410 U.S. at 376.

[15] Petitioner seeks to distinguish this case from *Otter Tail* and *Cantor* (a case that involved the state action exemption, see pages 12-13, *infra*) on the ground that (Pet. 9-10) "[t]he alleged violations of the antitrust laws in those cases involved various activities other than the filed electric rates" while in this case "the alleged violation is based *solely* on the economic effect of [UE's] rates * * *" (emphasis in original). This distinction, however, does not affect the basic principle applicable to this case: antitrust immunity will not be implied in the absence of actual conflict with a federal regulatory statute.

[16] Congress, of course, may authorize private conduct that otherwise would violate the antitrust laws. Under the Supremacy Clause (Article 6, Clause 2), however, states cannot override federal antitrust law. Therefore, the implied repeal doctrine does not apply to state legislation. This is to be distinguished from the state action doctrine, which recognizes

existence of federal regulatory authority to review conduct under a standard different from that of the Sherman Act, that led to a determination that the restraints at issue were immune from antitrust liability.[17]

Petitioner also is incorrect in contending (Pet. 13-14) that *FPC* v. *Conway Corp.*, 426 U.S. 721 (1976), precludes application of the Sherman Act to the alleged price squeeze. This Court held in *Conway* that the FPC has jurisdiction to consider the relationship between jurisdictional (wholesale) and nonjurisdictional (retail) rates in determining whether jurisdictional rates are just, reasonable and nondiscriminatory. *Conway* did not hold that the FPC's jurisdiction to consider price squeeze allegations was exclusive, and there is no indication that Congress intended to give FERC sole jurisdiction to consider and remedy

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that Congress did not intend the Sherman Act to prohibit restraints that are fairly attributable to state decisions to replace competition with state supervision and control rather than private conduct. *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). Where conduct is fairly attributable to private parties it is subject to the Sherman Act even if approved by a state. *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 n.45 (1978); *Cantor* v. *Detroit Edison Co.*, *supra*; *Parker* v. *Brown*, *supra*, 317 U.S. at 351.

[17] Thus, the fact that an agency must consider the competitive effects of action subject to its jurisdiction before approving it as consistent with the public interest as defined by the regulatory statute does not justify an implied antitrust immunity. See, e.g., *United States* v. *RCA*, 358 U.S. 334 (1959) (FCC approval of exchange of broadcast licenses does not confer antitrust immunity); *California* v. *FPC*, 369 U.S. 482 (1962) (FPC approval of acquisition does not confer antitrust immunity).

alleged price squeezes.[18] Application of the antitrust laws to alleged price squeezes would not frustrate FERC's regulation of wholesale rates. On the contrary, the availability of antitrust relief provides a necessary complement to FERC's limited power to remedy a price squeeze. All that FERC can do prospectively is to adjust the wholesale rate within the zone of reasonableness.[19] See *FPC* v. *Conway Corp.*, *supra*, 426 U.S. at 278. If this is inadequate to remedy a price squeeze, FERC cannot compel a utility to file higher retail rates.[20]

3. Petitioner's final argument for antitrust immunity is that the conduct at issue falls within the state action exemption of *Parker* v. *Brown*, 317 U.S. 341 (1943). The conduct alleged to violate the antitrust laws in this case, however, does not constitute "state action" as that doctrine has been articulated by this Court. Rather, what is at issue is an essentially private restraint that is fully subject to the antitrust laws.

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[18] Nor can FERC award damages for the effects of unreasonable or discriminatory rates. *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, 1325 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978); see also *CF Industries, Inc.* v. *Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33, 35-36 (4th Cir. 1980); *State of Louisiana* v. *FPC*, 503 F.2d 844, 867-868 (5th Cir. 1974).

[19] With respect to past harm, FERC can award refunds only in cases where it has suspended the rate; it cannot otherwise provide retroactive relief. *City of Batavia* v. *FERC*, 672 F.2d 64, 89 (D.C. Cir. 1982).

[20] Under the doctrine of primary jurisdiction the antitrust court may refer to FERC any issues calling for the agency's expertise. *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, *supra*, 560 F.2d at 1322.

This Court held in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that "anticompetitive activities must be *compelled* by direction of the State acting as a sovereign" in order for private defendants to claim state action immunity for their conduct. 421 U.S. at 791 (emphasis added). This holding was reaffirmed in *Cantor* v. *Detroit Edison Co.*, *supra*, 428 U.S. at 592-598.[21] Nothing in the Court's subsequent state action decisions involving state agencies and instrumentalities [22] has altered this compulsion standard for assessing private conduct. Neither the price squeeze at issue in this case nor UE's retail rates themselves are compelled by the state of Missouri. Therefore, under this Court's prior holdings, the state action defense is not available to UE.

In addition, even if the state action criteria applicable to governmentally imposed restraints (rather than the compulsion test) were applied to UE's alleged price squeeze, it still would be subject to the antitrust laws under the standard of *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 105. As the court of appeals correctly found (Pet. App. A-13), there is no clearly articulated state policy in favor of the alleged price squeeze, and the relationship between UE's wholesale and retail rates cannot be "actively supervised" by the state of Missouri since it has no authority over UE's wholesale rates.

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[21] See also 428 U.S. at 600 (plurality opinion); 428 U.S. at 604 (Burger, C.J., concurring); 428 U.S. at 609 (Blackmun, J., concurring); 428 U.S. at 623-626 (Stewart, J., dissenting) (all indicating approval of *Goldfarb* compulsion test).

[22] *City of Lafayette* v. *Louisiana Power & Light Co.*, *supra*; *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, *supra*; *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.[23]

Respectfully submitted.

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[23] The other issue presented in the petition—whether electricity is a "commodity" within the meaning of the Robinson-Patman Act—does not warrant review by this Court at this stage of the litigation. Petitioner has failed to show that the Eighth Circuit's holding on this issue is in conflict with that of any other court of appeals. At most, it has shown a conflict with two district court decisions (Pet. 16-17). Nor is the issue of sufficiently great importance to require decision by this Court in the absence of conflict; it has arisen only rarely in reported decisions of the lower courts. See Pet. 16-17; Br. in Opp. 17-19.

Moreover, the question whether electricity is a "commodity" may not dispose of petitioner's Robinson-Patman Act claim. The district court also held that claim defective for failure to allege that the challenged sales took place in interstate commerce. As the court of appeals noted (Pet. App. A-15): "Kirkwood asked for leave to amend its complaint to correct the supposed deficiency, but the District Court never ruled on the request." Thus, any review of this issue should await final determination of the Robinson-Patman Act claim by the lower courts.

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